MALAYSIAN REPORTS

Re Sarjit Singh Khaira

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KG 275 OF 1989
MOHAMAD NOOR J
1 SEPTEMBER 1990

Civil Procedure — Extension of time for leave to apply for order of certiorari — Whether there was inordinate delay in filing application — Whether present court functus officio — Estoppel upon res judicata — Rules of the High Court 1980, O 5 r 3, O 3 r 5 & O 53 r 1A

The applicant had been dismissed by the State Public Service Commission on 14 December 1988. The decision was communicated to the applicant on 27 December 1988 but he was only told of the date of the decision on 1 July 1989. Leave had been granted to the applicant to apply for an order of certiorari to quash the decision but at the hearing of the motion a preliminary objection was made by the respondent that the application for leave was out of time. This was upheld and an appeal to the Supreme Court was dismissed, on 28 November 1989. The applicant filed the present application on 8 December 1989, for leave to apply for extension of time to apply for leave to apply for an order of certiorari.

Held, allowing the application:

(1) The applicant had adopted the correct mode for the application by originating summons instead of by originating motion, having regard to the provisions of O 5 r 3 and O 3 r 5 of the Rules of the High Court 1980. Even if the court is wrong on this, the learned deputy had not applied to set aside the application on the ground of irregularity, and it is now too late to raise the objection.

(2) The ten-day delay on the part of the applicant in applying for leave to apply for an order of certiorari is not inordinate. The applicant's explanation that (i) he was in poor health and depressed; (ii) he could not instruct his lawyer to proceed earlier due to financial difficulties; and (iii) the State Public Service Commission contributed to the delay by informing him of the decision to dismiss him 13 days later and not divulging the actual date of the decision until six months had elapsed, was to the satisfaction of the court.

(3) When the appeal was pending before the Supreme Court, the applicant could not be expected to apply for an extension of time because the applicant was then still contending that he was within time. The present application was filed 18 days after the Supreme Court decision and this is not an inordinate delay. A stay of execution on the lower court's decision was not necessary as the applicant was not threatened with execution of any sort.

(4) The oral application for extension of time was not entertained by the lower court hearing the motion for an order of certiorari and the issue of delay, including the applicant's explanation, was never canvassed before the court. The present court is therefore not functus officio.

(5) There was no appeal on the extension of time before the Supreme Court nor was the issue of extension of time raised before the Supreme Court. The conditions for an estoppel to arise upon res judicata have therefore not been fulfilled.

[Bahasa Malaysia summary

Pemohon telah dipecat oleh Suruhanjaya Perkhidmatan Awam Negeri pada 14 Disember 1988. Keputusan itu telah diberitahu kepada pemohon pada 27 Disember 1988 tetapi tarikh keputusannya hanya diberitahu kepada pemohon pada 1 Julai 1989. Kebenaran telah diberi kepada pemohon untuk memohon suatu perintah certiorari bagi membatalkan keputusan tersebut tetapi pada tarikh perbicaraan usul itu, suatu bantahan permulaan dibuat oleh pihak penentang bahawa permohonan untuk kebenaran itu dibuat di luar had masa. Ini telah disahkan dan rayuan kepada Mahkamah Agung telah ditolak pada 28 November 1989. Pemohon telah menfailkan permohonan ini pada 8 Disember 1989 untuk kebenaran bagi memohon perlanjutan masa bagi memohon kebenaran memohon perintah certiorari.

Diputuskan, membenarkan permohonan:

(1) Pemohon telah terima-pakai cara yang betul dalam permohonan ini melalui saman pemula dan bukannya melalui usul pemula, memandangkan peruntukan A 5 k 3 dan A 3 k 5 Aturan Mahkamah Tinggi 1980. Walaupun sekiranya, mahkamah khilaf dalam perkara ini, namun demikian, pemangku peguam besar negeri yang bijaksana tidak memohon untuk mengenepikan permohonan atas alasan luar aturan dan sekarang adalah terlambat bagi menimbulkan bentahan ini.

(2) Kelengahan sepuluh hari oleh pemohon dalam memohon kebenaran untuk memohon perintah certiorari tidaklah tak berpatutan. Keterangan pemohon ialah (i) kesihatannya tidak baik; (ii) dia tidak boleh mengarah peguamnya terlebih awal kerana dalam kesulitan kewangan; dan (iii) Suruhan-jaya Perkhidmatan Awam Negeri juga menyumbang kepada kelengahan itu dengan memberitahunya keputusan pemecatannya 13 hari selepas itu dan tidak mengisytiharkan tarikh sebenar keputusan itu sehingga enam bulan berlalu telah memuaskan mahkamah.

(3) Semasa rayuan itu masih menunggu pendengaran oleh Mahkamah Agung, pemohon tidak boleh dijangka memohon perlanjutan masa kerana pemohon pada ketika itu masih mengatakan dia bertindak dalam tempoh had masa. Permohonan ini telah difail 18 hari selepas keputusan Mahkamah Agung dan ini bukanlah kelengahan tak berpatutan. Penggantungan perlaksanaan keputusan mahkamah rendah juga tidak perlu sebab pemohon tidak diancam dengan sebarang jenis perlaksanaan.

(4) Permohonan secara lisan untuk perlanjutan masa tidaklah diambil perhatian oleh mahkamah rendah yang mendengar usul untuk perintah certiorari dan isu kelengahan, termasuk keterangan pemohon tidaklah dikemukakan di hadapan mahkamah. Oleh yang demikian, mahkamah ini tidaklah functus officio.

(5) Tidak terdapat rayuan atas perlanjutan masa di hadapan Mahkamah Agung dan isu perlanjutan masa itu tidak juga ditimbulkan di hadapan Mahkamah Agung. Oleh itu, syarat-syarat bagi estopel ditimbulkan atas res judicata tidaklah dipenuhi.]

Cases referred to

1 *Ong Guan Teck & Ors* v *Hijjas* [1982] 1 MLJ 105 (refd)
2 *Haji Wan Habib Syed Mahmud* v *Datuk Patinggi Hj Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198 (refd)
3 *Commissioners of Inland Revenue* v *Sneath* [1932] 2 KB 362 (folld)
4 *Society of Medical Officers of Health* v *Hope* [1959] 1 QB 462 (folld)
5 *Duchess of Kingston*'s case (1776) 2 Sm LC (7th Ed) 761 (refd)

Legislation referred to
Rules of the High Court 1980 O 2 r 2(2), O 3 r 5, O 5 r 3, O 53 r 1A

TO Thomas for the applicant.
Abdul Halim bin Hj Sabil (Pemangku Peguam Besar Negeri) for the respondent.

Cur Adv Vult

Mohamad Noor J: In this originating summons, the applicant applied for an extension of time to apply for leave to apply for an order of certiorari to remove into this court, for the purpose of being quashed, the decision of the State Public Service Commission, Sarawak, made on 14 December 1988 which dismissed the applicant from the State Civil Service.

The background leading to this application is briefly as follows:

(1) On 14 December 1988, the State Public Service Commission decided to dismiss the applicant. The decision was communicated to the applicant on 27 December 1988 but the applicant was informed of the date of the decision only on 1 July 1989.

(2) On 4 February 1989, the applicant filed an ex parte notice of motion for leave to apply for an order of certiorari for the purpose of having the said decision quashed. On 13 March 1989, leave was granted and when the motion (OM No KG 4 of 1989) was heard before Haidar J on 4 July 1989, the learned Deputy State Attorney General raised a preliminary objection contending that the applicant's application for leave to apply for an order of certiorari was out of time by ten days. The preliminary objection was upheld. The applicant's counsel applied orally for extension of time but was not considered because it was not properly made. The motion was dismissed. [See [1990] 1 MLJ 360.]

(3) The applicant appealed to the Supreme Court. The appeal was dismissed on 20 November 1989. The Supreme Court held that the relevant date for the purpose of O 53 r 1A, was the date when the State Public Service Commission made the order of dismissal (ie 14 December 1988) and not the date of the letter by which the decision was communicated to the applicant, as held by the court below (ie 27 December 1988).

(4) The applicant filed the present application on 8 December 1989.

The learned deputy opposed the application on the following grounds:

(a) The application is irregular.
(b) There has been an inordinate delay on the part of the applicant in making the application.
(c) The court is functus officio.
(d) The court has no jurisdiction to hear the application because of res judicata.

At the hearing in chambers, I allowed the applicant's application and ordered the applicant to file the application for leave to apply for an order of certiorari within four weeks from the date of the order. However, the learned deputy applied for further argument in open court and was granted.

Now, I will deal with the grounds raised by the learned deputy. With regard to ground (a), the learned deputy contended that the application in relation to a certiorari proceeding should have been made by way of originating motion instead of by originating summons. In my view, having regard to the provisions of O 5 r 3 and O 3 r 5 of the Rules of the High Court 1980, the applicant had adopted the correct mode. Even if I am wrong, as the learned deputy had not applied to set aside the applicant's application on the ground of irregularity, as required by O 2 r 2(2), especially so when he had already filed his affidavit-in-opposition on 14 April 1990, it is now too late for him to raise this objection. Therefore, this ground has no merit.

In respect of ground (b), the learned deputy contended that there was an inordinate delay of about ten and a half months on the part of the applicant in making this application. The State Public Service Commission made the dismissal order on 14 December 1988 and for the purpose of O 53 r 1A, the application for leave should have been made by 25 January 1989, but the present application was filed only on 8 December 1989. Further, he insisted that, in view of the provisions of s 73 of the Courts of Judicature Act 1964 and O 56 rr 1(1) and (4), as the applicant failed to apply for stay of execution of the decision of Haidar J made on 4 July 1989, the present application should not be entertained. The cases of *Ong Guan Teck & Ors* v *Hijjas*[1] and *Haji Wan Habib Syed Mahmud* v *Datuk Patinggi Hj Abdul Taib Mahmud & Anor*[2] were cited in support thereof. My view is that, two issues will have to be considered in this application. First, whether the ten-day delay on the part of the applicant in applying for leave to apply for an order of certiorari (see para 2(2) above) has been accounted for to the satisfaction of the court? Secondly, whether there has been a delay in applying for extension of time and if so, whether the delay is inordinate? On the first issue, I am of the opinion that the delay is not inordinate and has been accounted for to the satisfaction of the court. The explanation for the delay is contained in paras 14 to 19 of the affidavit of Sarjit Singh Khaira affirmed on 7 December 1989. In a nutshell, the reasons for the delay are as follows:

(i) He was in a poor state of health and depressed, which is supported by medical evidence.
(ii) He could not instruct his lawyer to commence proceeding earlier due to financial difficulties.

(iii) The State Public Service Commission contributed to the delay by not communicating the decision to dismiss him as soon as possible but only after 13 days later and further, the actual date of the decision was not divulged to him until six months had lapsed.

With regard to the second issue, I am of the view that when the appeal was pending before the Supreme Court, the applicant could not be expected to apply for an extension of time because the applicant was then still contending that he was within time. The Supreme Court made its decision on 20 November 1989 and the present application was filed 18 days later. In my view, the 18-day delay is not inordinate. Nothing should be construed against the applicant for not applying for stay of execution of the decision of Haidar J because, to my mind, an application for stay of execution is not imperative in every case of appeal and further, on the facts, there was no necessity for the applicant to apply for stay of execution as he was not threatened with execution of any sort. Therefore, this ground also has no merit.

In the case of ground (c), the learned deputy contended that an oral application for extension of time was made before Haidar J but was refused on the ground that it was not made in proper manner. Therefore, as the matter had been decided by another judge of equal jurisdiction, this court is functus officio. With due respect, such contention is untenable having regard to the record of proceedings before Haidar J. It is manifestly evident from the judgment that the oral application for extension of time was not entertained by Haidar J and the issue of delay, including the applicant's explanation for the delay, was never canvassed before the court. In other words, Haidar J did not consider the issue of delay at all.

With regard to ground (d), the learned deputy contended that as the appeal against Haidar J's decision (which, inter alia, refused the applicant's application for extension of time) had been dismissed by the Supreme Court, this court is estopped from hearing the present application on the principle of res judicata. With due respect, this contention is also untenable having regard to the record of proceedings before the Supreme Court. It is evidently clear that there was no appeal touching the extension of time, nor was the issue of extension of time raised before the Supreme Court and nor was it in the memorandum of appeal. The Supreme Court merely decided on the construction of the words '... within 6 weeks after the date of the proceeding ...' in O 53 r 1A, based on the facts of the case. Having regard to the circumstances of the case, I conclude that the following conditions for an estoppel to arise upon res judicata have not been fulfilled (per Lord Hanworth MR in *Commissioners of Inland Revenue* v *Sneath*[3] at p 380):

> There must be a lis inter partes in which the point relied upon for establishing the estoppel was not merely incidentally, or collaterally, discussed and litigated, but was fundamental to the conclusion reached by the court.

Per Lord Justice Morris in *Society of Medical Officers of Health* v *Hope*[4] at p 481 quoting the passage from the judgment of Chief Justice De Grey in *Duchess of Kingston*'s case:[5]

> But neither the judgment of a concurrent or exclusive jurisdiction is evidence (that is, as I understand the meaning of the Chief Justice, conclusive evidence) 'of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment'.

In the circumstances and for the aforesaid reasons, the earlier order that I made in chambers is hereby affirmed, ie the application for leave to apply for certiorari must be filed within four weeks from today. Costs are to be in the cause.

Application allowed.

Solicitors: *Thomas & Co.*

Reported by *Zarinah Marican*

Senator Lau Keng Siong & Anor v Ng Cheng Kiat

HIGH COURT (MUAR) — CIVIL SUIT NO 22-23 OF 1990
RICHARD TALALLA JC
4 JULY 1990

Civil Procedure — Injunction — Plaintiffs attempting to restrain political party from holding general assembly elections — Injunction to restrain party from expelling or suspending the plaintiffs until final determination of suit — Domestic remedies not exhausted — Balance of convenience — Quia timet — No evidence of threatened wrong

Administrative Law — Ouster clauses — Jurisdiction — Whether decision to suspend elections within jurisdiction of steering committee and Presidential Council of association — Societies Act 1966, s 18C

Societies — Finality of political party's decisions — Power and authority of association to suspend elections — Plaintiff not having exhausted domestic remedies before taking disputes to court — Societies Act 1966, s 18C

Civil Procedure — Mandatory injunction — Order to be precisely worded — Nature and extent of problem not known — Court not able to supervise compliance of mandatory injunction

The first plaintiff is a life member of the Malaysian Chinese Association ('the association'), chairman of its Muar division and chairman of a branch of the association which falls under the Muar division. He is also a senator. The defendant is the secretary-general of the association which is a political party registered